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In the Supreme Court of the United States

October Term, 1958

JOHN C. WEBB AND HELEN H. WEBB, Petitioners

v.

UNITED STATES OF AMERICA, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JOHN C. WEBB

JOHN C. WEBB
HELEN H. WEBB,
Petitioners
Route 1, Box 225,
Gaithersburg, Maryland

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

John C. Webb, on behalf of the petitioners, prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fourth Circuit, issued 30 June, 1958, denying an appeal from the United States District Court for the District of Maryland, at Baltimore.

OPINIONS BELOW

The opinions of the courts below are (Appendix A, infra, pp. 16-19 and Appendix B, infra, pp. 20-28) and reported as John C. Webb and Helen H. Webb, appellants v. United States of America, appellee, No. 7658, 256 F2nd 669 and as United States of America v. 72.71 acres, more or less, Civil No. 8628, 157F Supp. 401. The Inquisition and Judgement of the trial are dated and entered October 24, 1957, in the District court of the Baltimore District (Appendix C, pp. 29).

JURISDICTION

The jurisdiction of this court is invoked under:

1. Amendment V to the Constitution for the United States of America, which states that no person will be deprived of property without due process of law, nor shall private property be taken for public use without just compensation.

2. Amendment VII to the Constitution for the United States of America, which states that in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

3. By reason of its supervisory jurisdiction over proceedings of Federal courts, and the exercise of such jurisdiction through seeing that the waters of justice are not polluted. USCA Title 28, Section 1254, Note 2.

The judgement sought to be reviewed is dated and entered June 30, 1958, in the United States Court of Appeals for the Fourth Circuit (Appendix A, infra, pp. 16-19).

On September 27, 1958, an order extending time to file petition for writ of certiorari by 30 days to and including October 27th, 1958, was signed by Mr. Chief Justice Warren.

On October 22, 1958, an order extending time to file petition for writ of certiorari by 30 days to and including November 26, 1958, was signed by Mr. Chief Justice Warren.

QUESTIONS PRESENTED FOR REVIEW

1. Whether affirmation by the Court of Appeals of a previous denial by the District Court of appellants' motion for a new trial, on the ground that government counsel had improperly mingled or associated with the jury, was an abuse of discretion?

2. Whether affirmation by the Court of Appeals of a previous denial by the District Court of appellants' motion for a new trial, on the ground that government counsel and witnesses had improperly referred to the purchase price appellants had paid for their land, was an abuse of discretion?

3. Whether affirmation by the Court of Appeals of a previous denial by the District Court of appellants' motion for a new trial on both of the grounds stated in the foregoing question, was an abuse of discretion?

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

The Constitutional provisions and statute which the case involves follow:

Amendment V. "No person shall — be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use without just compensation."

Amendment VII. In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

USCA Vol. 28, Section 1254(2). Prior to 1925, the jurisdiction conferred on the Supreme Court to review

decrees of the Circuit Court of Appeals on certiorari was not conferred merely to give the defeated party another hearing, but to secure uniformity of decision and to bring up cases of importance, which it is in the public interest to have decided by the court of last resort.

STATEMENT OF THE CASE

The United States, by right of eminent domain, which power was not in dispute, took land on 5 December, 1955, from an 197.75 acre farm owned by the petitioners for a NIKE launching site. The total thus taken was 35.59 acres consisting of 13 acres in fee simple and 22.59 acres by easement. The easement consisted of a) prohibition to construct dwellings, b) prohibition for more than 25 people to be in this area at one time, and c) right of access at any time.

The farm is located two miles NNE of Gaithersburg, Maryland in Montgomery County. Gaithersburg is in a rapidly growing election district that had a population of 6,150 in 1954.

The sole question in dispute was "just compensation". The United States had a maximum appraisal of $10,000 based on highest economic use as agricultural land. The petitioners had a minimum appraisal of $41,354 based on highest economic use as potential development property.

The case came to trial in the U. S. District Court of the Baltimore District on 22 October, 1957 and the jury arrived at an inquisition and judgement of $14,000 on 24 October, 1957. (Appendix C, infra, pp. 29). This was $4,000 more than the valuation as farmland and $27,354 less than valuation as potential development property.

A motion for a new trial was heard by the trial court

on 6 December, 1957 and denied on 24 December. (Appendix B, infra, pp. 20-28). An appeal to the U. S. Court of Appeals, Fourth Circuit, was heard on 12 June, 1958 and denial published and entered on 30 June. (Appendix A, infra, pp. 16-19).

The facts, upon which the questions for appeals were based, follow:

QUESTION I

Improper mingling. association or relationship between U. S. attorneys and the jury.

a. Discussions were held, in the presence of the jury, concerning the plans for the jury viewing the property. The court, questioning U. S. attorney Ferris rather than the Deputy U. S. Marshal, asked "Now, what arrangements have you made, Mr. Ferris for the Marshal to take the jurors to see the land?" The government counsel replied giving full details. (Transcript pp. 3-5).

b. The U. S. attorney said, in his opening remarks to the jury concerning the jury's performing its functions "To do this you, of course, as has already been indicated, inspect the property — you take a bus trip." (Transcript pp. 9) and "after **we** take **our** bus trip today, **we** will come back tomorrow and the government — " (emphasis supplied). (Transcript pp. 9).

c. After opening statements by counsel, the court instructed the jury as to the place of departure in the bus, provisions for lunch, what to and what not to see and listen to, and instruction that they were in care of the marshal (Transcript pp. 10-12). The place of boarding the bus was given as the Lafayette or Fayette Street entrance to the court building.

d. The jury left the court room, led by the Marshal and closely followed by the U. S. attorneys. It was understood between counsel that we (Messrs. Oxley, counsel, and Webb) would ride with them in the bus. (Transcript pp. 29, 31 and 32).

e. Messrs. Oxley, counsel, and Webb were unable to find the bus. Representatives of the U. S. attorney and of the Marshal were unable to locate us. Each then proceeded independently and the petitioners and counsel happened to find the place selected for the jury's luncheon when the bus drove up. The bus trip from Baltimore, with the U. S. attorneys, U. S. Deputy Marshals and the jury on board, took about 1 hour. (Transcript pp. 30).

f. One juror volunteered to the petitioner, as the jury disembarked, that the U. S. attorneys had been "very circumspect" in their conduct. Luncheon took about 40 minutes (Transcript pp. 30).

g. Proceeding with the others towards the bus for Mr. Oxley to embark with the others after luncheon, the U. S. attorney, instead of welcoming Mr. Oxley, suggested publicly that Messrs. Webb and Oxley lead the way in Webb's car. The trip to the farm took about 30 minutes. (Transcript pp. 30).

h. The U. S. attorney stated to the jury, as they embarked after the viewing, that they would return to Baltimore by a different and more direct route than the one we had led them over. (Transcript pp. 30).

i. The U. S. attorney stated that on the return trip the case was not discussed by any one to his knowledge and that he did not speak to any of the jurors "except to say goodnight as various of the jurors left the bus along the return route with the

further exception, that is, that Mrs. Betty K. Hamburger, a juror, spoke to him about the possibility of stopping the bus along the return route to make a telephone call." (Transcript pp. 34).

QUESTION II

Deliberate and improper injection of the purchase price figure of $23,000, never established as evidence, into the opening remarks by the U. S. attorney, by testimony of witnesses and by the U. S. attorney into the closing statement, which although previously adversely ruled on by the court, the introduction of the figure continued.

a. Mr. Ferris stated in opening remarks that the property was purchased by the petitioners in 1949 for $23,000. Objection was made but the court deferred ruling until evidence was heard (Transcript pp. 9).

b. Mr. Ferris then said "I just meant it had been sold in 1949. **I perhaps should not have mentioned the figure.** (emphasis supplied) The Court then said "I did not hear what the figure was, if any (Transcript pp. 10).

c. An appraiser for the government, Mr. Hall, on the stand, was questioned by the U. S. attorney: "Now, are you aware of the purchase price paid by Mr. Webb, for this property — this farm?" Objected to by counsel, the U. S. attorney said, "While Mr. Oxley is searching for the case, perhaps I can explain. Obviously the government is not contending that it is a comparable sale, since we have laid the foundation to show that Mr. Hall thinks that the value of the property (ed as agricultural land) as of the time of taking, was

$60,000". The Court: "Well, I do not know what the price was that was paid for the property, so I cannot tell whether the $60,000 is more or less" (Transcript pp. 18 and 19).

d. A government appraiser, Mr. Beasly, answering a question on a government comparable during cross-examination said: "I enquired into the terms and circumstances of the sale also the Webb purchase". Mr. Oxley objected for defendants to line of answer. The Court: "Is there anything for me to rule on?" Mr. Oxley: "Yes sir. I move that his answer about Captain Webb's farm — what Captain Webb paid for it — go out."

The Court: "Very well; strike it out." (Transcript pp. 22).

e. During the closing argument to the jury by government counsel, the following occurred:
Mr. Ferris: "I will say, secondly that it has been implied that I meant to take some unfair advantage of the Captain and his wife. Actually, the price for which Captain and Mrs. Webb purchased their property was referred to for one purpose — to furnish a possible offer upon which our appraisers could decide about increases in land value in that area. Now, witnesses for the government have contended that property was not worth much more than $23,000."

The Court: "More than what?"

Mr. Ferris: "More than I stated in my opening statement. **I probably should not have mentioned the figure. I said $23,000.** (emphasis supplied)

The Court: "I never heard the figure, so it is not in the case" (Transcript pp. 25-26).

Amendment V to the Constitution states that no person will be deprived of property without due process of law; nor shall private property be taken for public use without just compensation. The divergence of the judgement of $14,000 from the government appraised figure by only $4,000 and from the petitioners appraised figure by $27,354 raises the question as to whether "due process" did actually exist in arriving at just compensation.

Due process here is a proceeding to ascertain just compensation to be made for property taken for public purposes and is a proceeding at common law to which the trial by jury necessarily adheres. Filbin Corp. v. U. S. DCSC 1920, 266 F911.

Amendment VII states that in suits at common law, where the value of a controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States than according to the rules of the common law. The right to jury trial guaranteed by this amendment is one of substance and not of form or procedure. Diederich v. American News Co., CCA Okla. 1942, 128 F2d 144.

To further uniformity throughout the jurisdiction of Federal courts, there was developed, more than a decade ago, Federal Rules of Civil Procedure. As to trials, "the Federal Rules have as their fundamental premise the elimination of tactical surprise and of technical advantage. They look on a lawsuit as an orderly search for the truth rather than as a sporting event depending on the craft of two legal gladiators" — Federal Practice and Procedure, Rules Edition, Barron and Holtzoff. Volume 4, pp. v, Forward by Arthur T. Vanderbilt.

QUESTION I

It is argued that the manner in which the jury was instructed by the Court, prior to the viewing, and the manner in which the viewing was operated were such as to promote bias towards the U. S. attorney and against the defendants. Salesmanship texts recognize the value of having status established for a salesman with a sales prospect by a seemingly unprejudiced and prominent individual. The judge vouched for superior status of the U. S. attorney as compared to his own agent, the Deputy U. S. Marshal, or the counsel for the defendants when he addressed his remarks concerning the trip to the U. S. attorney. Although there was an understanding between counsel that both would go on the trip, all effective effort of the U. S. attorney was to result in counsel for defendants being isolated from the bus trip with the jury to the farm. Damage had already been done so defendant or counsel did not return in bus with jury to Baltimore.

There was provided an additional opportunity for the U. S. attorney to achieve dominance with the jury through a technique for closing sales, well recognized in salesmanship — the "minor point" method. "Successful Salesmanship," Ivey and Horvath, Prentice-Hall, pp. 353, says: "If you can get the customer to make a decision on some minor point, it is easier to get him to make the major decision necessary in closing the sale." Although the jury knew that the counsel for the defendants and the defendant were to accompany them, as well as the U. S. attorneys, we did not. Timely staff work in the court room would have assured our presence, but was not offered. The counsel for the defendants intended to board the bus after luncheon. The U. S. attorney so arranged in public that this could not be achieved without rudeness and injury to the cause.

Whichever alternate course Mr. Oxley or I might choose was wrong. Either way, the defendants lost prestige. It is argued that a trial is a search for truth and not a sales contest.

As the trip progressed, team work between the jury and U. S. attorneys was bound to develop with the defendants becoming the outsiders or strangers. The U. S. attorney Ferris emerged in the role of "host", as evidenced by the request to telephone made to him by Mrs. Hamburger, and of "leader", as his status with the court and as he gave directions in the nature of orders, set a pattern of obedience.

No ruling could be found where the viewing by jury was administered, as was this viewing, leading to possible bias of the entire jury towards one party to a trial as compared with possible bias against the other party. It is clear from this case that such a ruling should be made against permitting representatives of only one party accompanying the jury, regardless of acceptance by all parties. Further, the Marshal should be the custodian of the jury and be the agent of the court in substance as well as form.

There are many overrulings granting new trials by state appeals courts where possible bias or prejudice might have resulted from accidental or incidental association of a single juror and counsel for or agent of the prosecution. In these cases, no overt acts leading to traceable result was required. Nor was timely objection or exception needed where the purity of the jury action was at all suspect, and therefore in the realm of public interest. Lynch v. Kleindolph, 204 Ia. 762, 216NW2; Village of Bangor v. Hussa Canning and Pickle Co., 208 Wisc. 191, 242NW565; State v. Neville, (Iowa), 288NW85.

The court below ignored entirely the consideration of possible bias by reason of association, in a leader and follower situation, between U.S. attorneys and jury. The lower court viewed and dismissed the matter entirely from the point of view of lack of timely objection and overt act traceable in positive bias. It ignored the climate in which association does breed loyalty for a fellow traveller and bias against the stranger.

The trial court recognized the principle involved but denied the applicability in this case in the absence of private and individual entertainment and of objection and exception made promptly after first discovery.

A ruling by this court is needed in this area and in this instance leading to a new trial under conditions that will not duplicate the opportunity for growth by association of loyalty to one party to develop within a jury.

QUESTION II

The record shows that the U. S. attorney relied heavily in his trial tactics upon the purchase price of $23,000 paid by the petitioners in 1949 for their property. He mentioned the price in his opening statements, in the remarks made by or invited from the two government appraisers and in his closing remarks. An experienced trial lawyer for the government, he made no attempt to establish the amount as evidence. After the judge had ruled against the amount as being in the trial he again introduced it in his closing remarks.

Pertinent to the use of cost figure as prejudicial, rather than real, evidence, is this statement: "Where coal is confiscated for government use, the owner is entitled to recover 'just compensation' therefor, as

guaranteed by this clause (edit just compensation) and not merely the cost to it of the coal at the mines." Dexter and Carpenter v. Davis, CCA Md. 1922, 281, F385.

Twice, the U. S. attorney showed his knowledge through his words that the cost figures of $23,000 should not have used. Once was in his opening remarks and the second was in his closing statement, each wording almost identical. These last were, "I probably should not have mentioned the figure. I said $23,000."

Never introduced as evidence, there was no showing, except comments by Hall, the government witness, that the value of $60,000 evidenced improved tilth of the land, as agricultural land, in consequence of the efforts of the petitioners over the years. In the meantime, it is contended that the figure of $23,000 (Transcript pp. 19) remained in the minds of the jurors as pre-eminent and prejudicial rather than the $60,000 appraised figure. The persistence of the U. S. attorney in the use of this original purchase price figure indicates its importance in his trial strategy and tactics.

The lower court dismissed consideration of the repetitive use of the figure of $23,000 by the U. S. attorney, which was not evidence, on the basis that no objection was made to this statement by the attorney for property owners. The trial court had precluded this objection and exception by ruling during the closing argument and before objection could be made by defendant that this figure was not in the trial. Besides, it was too late to do any good, that damage had been well and thoroughly done.

There have been several rulings calling for new trials following the introduction into a trial of information that was not evidence. Such include Preston v. Mutual

Life Insurance Co., 71F467; Vaughn v. Magee, 218F-(2)630(CCA3).

There have, too, been rulings calling for a new trial following prejudicial conduct or language of opposing counsel to prevent a fair and impartial trial as revealed by the record even where no objection thereto has been raised during the trial. The measure has been whether a fair trial was had. It is argued that violence need not be a part of prejudicial act. Neely v. State, 1936, 61 P2nd 741, 60 Okla. Cr 99; Wilder v. People, Colo. 65 ALR 1260; Aetna Life Insurance Co. v. Kelly, 93 ALR 472; Ickes v. Ickes, 44 LRA (NS) 1118, 78 ALR 1537; NYCR Co. v. Johnson (1929), 279 U.S. 310, Led 706, 49 S Ct 300 (reversing judgement of (1928, CCA 8th) 27 F(2d) 699).

In this instance, it is argued that objection was, in fact, made by counsel and ruled upon by the court against the use of the amount $23,000 during the trial. Such timely objection was not required, however, where the introduction of such information during the trial and in closing argument precluded a fair trial.

QUESTION III

It is contended that the patina of the case shows that the award was unduly influenced by something other than the existing drift of population from Washington to the suburbs and the attending effect shown in increased land values known by judicial notice.

Under questions 1 and 2, prejudicial influences, the first incidental and the second overt, are shown.

Where one question might not be compelling, the two provide an overall pattern which is believed to be compelling in establishing such prejudice as to preclude a fair trial for the defendants.

CONCLUSION

For the reasons given, this petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN C. WEBB,
Petitioner

JOHN C. WEBB
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APPENDIX A

OPINION OF THE COURT OF APPEALS

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 7658.

JOHN C. WEBB and
HELEN H. WEBB,
Appellants,

versus

UNITED STATES OF AMERICA,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND, AT BALTIMORE.

(Argued June 12, 1958. Decided June 30, 1958.)
Before SOPER and HAYNSWORTH, Circuit Judges, and BARKSDALE, District Judge.

Keith L. Seegmiller (Cecil E. Custer and Irving Wilner on brief) for Appellants, and Martin A. Ferris, III, Assistant United States Attorney, (Leon H. A. Pierson, United States Attorney, and John C. Gianakos, Assistant United States Attorney, on brief) for Appellee.

Per Curiam:

This appeal is taken from an order of the District Court overruling a motion for new trial in a condemnation suit brought by the United States for the condemnation in 1955 of a tract of land in Montgomery County, Maryland, belonging to John C. Webb and Helen H. Webb, his wife, the appellants. The land which was taken by the United States comprised approximately 23 acres of a tract of 200 acres that had been acquired by the property owners in 1949. Each side produced expert witnesses who differed widely in their valuations. The witnesses for the United States valued the entire tract at $56,000 to $60,000 and the value of the portion taken at $8,500 to $10,000. The witnesses for the property owners valued the entire tract at approximately $91,000 and the value of the property taken at $41,350 to $43,000. The jury found a verdict for the property owners in the sum of $14,000. They made a motion for new trial, which was overruled. They now contend that the District Judge abused his discretion in overruling the motion, which was based on two grounds: First, that the attorney for the Government improperly mingled with the jury during the course of the trial and, second, that improper references were made during the trial to the price paid for the property by the appellants in 1949.

After opening statements to the jury were made by the attorneys for the parties in the case, the jury was sent in a body to view the property accompanied by Deputy Marshals. It was arranged that they were to be accompanied by the lawyers on both sides. The judge announced that the property owners or their lawyers might accompany the jury and point out the lines of the property but that nobody was to say anything to them about the value of the land. Accordingly, the jury,

with court officials and the attorney for the Government, rode in a bus from the court house in Baltimore to the property in the county, but by reason of some misunderstanding the attorneys for the property owners failed to appear at the appointed time and consequently did not ride with the jury in the bus. They, however, proceeded to the property by separate conveyance and there met the jury. When the tour of inspection had ended attorneys for the property owners were offered an opportunity to return to Baltimore in the bus with the jury but they found it more convenient to decline as they could reach their homes more directly than by coming to the city. Under these circumstances, there is no substantial ground for complaining of the conduct of the attorney for the United States, or in assuming that he in any way misused the opportunity to confer with the jury in the absence of the attorneys for the opposing side. There is no evidence of any impropriety on his part.

The second ground on which the motion for new trial is based is likewise untenable. It is based upon the fact that the jury learned from certain statements of the attorney for the United States that the property owners had acquired their entire tract of land of approximately 200 acres in 1949 for the sum of $23,000. It is urged that these statements were prejudicial in view of the fact that the property was not taken by the United States until 1955 and that in the meantime the property had greatly increased in value. An examination of the record, however, convinces us that property owners suffered no harm in this respect. The first mention of the purchase price was made by the attorney for the United States in his opening statement. It was objected to as too remote in point of time but the judge declined to rule upon its relevancy until the evidence was taken. It was referred to a second time during the examination

of one of the expert witnesses for the Government but upon objection by the attorney for the property owners the evidence was stricken out by the court without objection from the United States. Subsequently, in his concluding argument, the attorney for the United States explained that he had referred to the purchase price to enable the appraisers to consider the increases in the value of land in the area and that the Government did not contend that the property was worth only $23,000 and had in fact offered two expert witnesses who had testified that the property was worth $56,000 to $60,000 at the time of the taking in 1955. No objection to this statement was made by the attorney for the property owners.

It is obvious, under these circumstances, that no harm was done to the property owners by the references to the price which they had paid for the property when they acquired it. At no time did they move the court to declare a mistrial on the ground that the mention of the purchase price was prejudicial, nor did they take any exceptions whatsoever to the judge's charge to the jury, which made a fair resume of the evidence and left to the jury to decide whether the land that was taken should be valued as agricultural land or land subject to subdivision and development for residential purposes. We find no justification for the contention that the judge abused his discretion in overruling the motion for a new trial.

Affirmed.

APPENDIX B

OPINION OF THE TRIAL COURT

ORDER AND MEMORANDUM OVERRULING MOTION BY WEBB AND WIFE, THE PROPERTY OWNERS, FOR A NEW TRIAL

Chesnut, District Judge,

This was a federal land condemnation case wherein the United States of America condemned 13 acres in fee simple and important easements in 22 additional acres of land belonging to John C. Webb and wife, situated in Montgomery County, Maryland. The case was instituted December 5, 1955. On October 29, 1956 John E. Oxley, a member of the bar of this court, entered appearance for the property owners. The trial of the case occurred on October 22, 23 and 24, 1957. It was actively and well tried by Martin A. Ferris, Assistant United States Attorney for this District, for the Government, and by Mr. Oxley for the property owners. The contention of the Government with respect to the amount of "just compensation" was that the property was worth not more than $10,000; while the property owners were contending for a much larger sum of about $40,000. By written inquisition the jury returned a verdict of $14,000. On November 1, 1957, Mr. Oxley filed an order striking out his appearance as counsel for the property owners as of October 28, 1957. On November 1, 1957 Messrs. Custer and Seegmiller, who had not theretofore been counsel in the case, as attorneys for the property owners filed a motion for a new trial on only general grounds that the verdict was contrary to the evidence and for irregularities in the trial, and obtained an order for the postponement of the hearing of the motion until they could obtain a transcript of the record of the case from the court reporter.

On November 25, 1957 the new attorneys filed a more specific motion for a new trial on the grounds (1) of improper conduct of the jury and counsel for the Government and (2) a statement by the Government witness, Beasley, of the purchase price which the defendants paid for their property. On December 6, 1957 counsel for the parties were heard in open court on the motion. There was submitted at that time an affidavit of John C. Webb with respect to the circumstances of the trip by bus of the jury to visit the property and there was also submitted the affidavit of Mr. Ferris with regard thereto and the oral testimony of Gerald F. Bracken, the Marshal of the Court and the statement of Arthur J. Robertson, a deputy clerk of the court for 31 years, regarding the practice in condemnation cases where the jury were required to visit and inspect the property.

The principal contention of counsel for the property owners in support of the motion for a new trial was based on the fact that Mr. Ferris had ridden in the bus with the jury who were going to inspect the property, and returned on the bus to Baltimore and thus the jury **may** have been subtlely and indirectly favorably influenced by the Assistant United States Attorney as to the Government's valuation of the property. The principle relied on by counsel for the property owners is indeed a sound one that where a party to a case or his counsel has created a situation whereby incidental and unnecessary courtesy and hospitality is **privately** furnished to a juror, during which there is a possibility of influence being exerted either intentionally or unintentionally, the necessity for keeping a jury verdict above suspicion should require the granting of a new trial even though the moving party is not able to prove actual influence on the juror. I think all Judges would agree that this is a sound principle but under all the evidence in this case,

I find no merit in the contention that such a principle should be here applied.

In the first place, it is important to know what has been the uniform procedure and practice in land condemnation cases in this court for 30 years or more past, in the hundreds of such cases in which juries have been required. On the first day of a trial the jury is impanelled; a comparatively short opening statement is made by counsel for the respective parties explaining in only a general way what is the property that is involved, and the purpose for which it is taken and where it is located. It is necessary for the jury to be taken to the property to inspect it and its surroundings in its location. The transportation is furnished by the Marshal of the Court and where the property is distant, as in this case fifty miles or more from Baltimore, the means of transportation is in a bus containing, in this case, at least 24 seats. The jury are told that they will be taken in a bus to visit and see the property in the custody of the Marshal and as they will be away the best part of a day a luncheon will be provided for them at a nearby place, by the Marshal of the Court. The jury are also told that when they see the property a representative of each of the parties will be on hand to point out to them the boundary lines of the property to be condemned; but that nothing will be said by the representatives of the parties regarding the value of the property or the just compensation to be determined by the jury: and that all the evidence to be considered by them in reaching their own figure as to just compensation will be that submitted to them in court in the usual way be testimony on the next day after their return from seeing the property, and that their valuation should be based on what they hear in court and their own personal view of the property.

As there are accommodations in the bus for more than the 12 jurors and the Marshal and his deputy, counsel for the parties can go along with the jury to visit the property if they desire. And it is expected that counsel for both parties can, if they wish, accompany the jury in the bus to and from the property. It is, of course, important for the proper and efficient trial of the case by counsel for the parties that they should at least be present at the site of the property when the jury inspect it and when the representatives of the parties familiar with the boundary lines of the property are there to explain to the jury where the lines run.

In the instant case both Mr. Webb and his counsel, Mr. Oxley, understood this from the proceedings in court before the jury went to visit the property, and it appears from Mr. Webb's affidavit that he and Mr. Oxley intended to go in the bus with the jury as well as Mr. Ferris and Mr. Gianakos, his assistant. The Marshal and the bus were ready in the parking area in the Court House Building and Mr. Webb and Mr. Oxley understood this, but apparently misunderstood exactly where the bus would start from. When the jury and the Marshal went down to the bus and found Mr. Webb and Mr. Oxley not there, the Marshal held the departure of the bus until Mr. Gavin, the deputy marshal, went back to the court room to try to find them. Not being able to find them after a considerable time of waiting, the Marshal directed the bus to go on. It did so and arrived at the luncheon place about the same time that Mr. Webb and Mr. Oxley arrived there, having proceeded in Mr. Webb's automobile. At the luncheon place only two tables were provided. The majority of the jury sat at one table while the Marshal, his deputy, Mr. Ferris, Mr. Gianakos, his assistant, Mr. Webb, Mr. Oxley and the remainder of the jury sat at another table. There was in fact no conversation of any kind regarding the property

at the luncheon. After the luncheon Mr. Oxley and Mr. Webb were invited to ride in the bus to the property, but volunteered to lead the way in their own automobile. On the property, in the usual way, the boundary lines were pointed out to the jury on behalf of the respective parties. After the jury had finished their inspection of the property the bus, as usual, returned to Baltimore by a slightly different route. Mr. Webb and Mr. Oxley residing nearby, preferred to remain and not return to Baltimore as they had the opportunity to do if they desired, with the jury in the bus.

There is no evidence whatever to show that at any time during the bus trip, going or coming, the Marshal, Mr. Ferris or Mr. Gianakos had any personal or individual conversation with any member of the jury regarding the property in any way. As a matter of fact Mr. Ferris sat with the Marshal in one of the seats of the bus some little distance away from the jurors.

It was suggested by counsel for the property owners in support of the motion for a new trial that the circumstances were such that the jury may well have inferred that Mr. Ferris was the "host" on this occasion. This is an unreasonable inference. The expense of taking the jury to the property, including the luncheon, was paid by the Marshal, under an order of court from funds appropriated by the federal government for jurors expenses in the federal courts and, of course, the funds therefore come from taxes paid by individual taxpayers, probably including all the jurors and counsel and other taxpayers.

Counsel for the property owners expressly disclaim that there was anything on the part of the jury or counsel to affect the result of the trial in any way. In substance, the only fact relied upon by them is that Mr. Ferris did ride in the bus with the jury to and from the

property. This was certainly not in any way showing private courtesy or hospitality by him or by the Marshal to any of the jurors. And the presence of Mr. Ferris in the bus was, like that of the Marshal, a necessary means of going to the property; and the property owners and their counsel knew that the bus was also provided for their accommodation and they were expected to go with the jury but missed the bus by their own failure to inquire as to its exact starting place. The bus was furnished by the Marshal in accordance with the uniform practice in such matters and as an incident necessary to jury service.

In supposed illustration of the principle relied on by counsel for the property owners, they have cited a number of decisions from various States, including Lynch v. Kelindolph, 204 Iowa, 762, 216 N.W. 2; Lavalley v. State, 188 Wisc. 68, 205 N.W. 412; Village of Banger v. Hussa Canning & Pickle Co., 208 Wisc. 191, 242, N.W. 565.

I have considered these cases and find the facts therein very different from the instant case. In most, if not all, of the cases cited, there was **private and individual** courtesy and hospitality offered to and accepted by a juror during which a representative of one of the parties entertained one of the jurors, although without evidence to show that anything was said about the pending cases. The principle involved is that where a juror is thus **privately** entertained, even though innocently, it is ground for a vacation of the verdict and a new trial, if made promptly after first discovery. The principle, while sound in its application to particular factual situations involved in the cases cited, would be misapplied here if used to defeat a verdict resulting from a full and fair trial on the merits of the case. It would indeed, in my opinion, be a misapplication in defeating an otherwise proper verdict under the facts here appearing.

No argument is submitted by counsel for the property owners that the verdict of the jury was not supported by the evidence in this case, nor is there any argument that the amount of just compensation as determined by the jury is inadequate on the evidence. As will appear from the charge of the court in this case, the important issue before the jury was whether the land taken should be valued on an agricultural basis as farm land where its highest utility was for agriculture, or whether, on the other hand, it should have been valued, as the property owners contend, for purposes of "development", that is, for retail sales of lots for residential purposes. On this issue the jury's own inspection of the land and the near-by surrounding lands, was doubtless very important in determining what was the highest utility of the property. That was a factual situation plainly visible to the eyes of the jurors and only as to which it is reasonable to assume that they were or could reasonably be thought to have been influenced subtlely by the mere proximity of the Marshal and counsel for the United States in the same bus.

Furthermore, the facts now made the basis of argument for a new trial were well known on the first day of the trial, to the property owners and their counsel. With full knowledge of this, Mr. Oxley had ample opportunity during the remaining two days of the trial, to call the matter to the attention of the court if he had felt, as he apparently did not at the time feel, that the circumstances justified a mistrial of the case. I think it is too late now for newly employed counsel, who did not in any way participate in the case, to raise this point. Wiltsey v. United States, 222 F. 2d 600; Fishbaugh v. Armour & Co., 185 F. 2d 541.

In connection with the alleged misconduct of Mr. Ferris, counsel also urge that in addressing the jury he

improperly referred to the figure of $23,000 as the original purchase price by the property owners for the whole of their property consisting of 198 acres. I have examined the stenographer's transcript with regard to this and find it affords no substantial reason for granting a new trial in view of the context in which the reference was made.

In the opening statement Mr. Ferris on the first day of the trial in general explanation of the subject matter, pointed out the whole of Mr. Webb's property consisted of 198 acres which had been purchased some years before for $23,000. Mr. Oxley, for the property owners, objected thereto and the court ruled that it could not be determined until during the testimony whether the date of purchase was too remote from the date of taking by the Government to make it admissible. When, on the second day of the trial during the taking of testimony of one witness for the Government, a reference was made to this figure as the original purchase price, Mr. Oxley objected and after some further inquiry as to time the court sustained the objection. The reference made by the witness Beasley, an expert appraiser called by the Government, is also made the basis for a motion for a new trial on the ground that the witness showed bias by making an unnecessary reference to the particular figure. The argument now made by new counsel is that this bias of the witness created such harm that it could not be repaired without a new trial. In the Court's charge to the jury a general reference was made to the fact that in considering the weight of the testimony of any witness the jury should consider also any bias that he might have displayed in the matter. I do not think there is any real substance in the present contention; but if it had been thought by Mr. Oxley, the trial counsel at the time, that there was, a motion for a mistrial should have been made at that time. I think it is entire-

ly too late for new counsel to make this point more than a month after the trial had been concluded.

Again it is urged that Mr. Ferris in a later argument to the jury again referred to the figure of $23,000. A reading of the transcript on that point would seem to indicate that the reference was really incidental; but in any event it appears that the court noted the mistake and in effect told the jury to disregard it.

For all these reasons I conclude that the motion for a new trial should be and it hereby **overruled** this 23rd day of December, 1957.

W. CALVIN CHESNUT
U. S. District Judge

True Copy
Test:
Wilfred W. Butschky
Clerk
By Mary A. Kelz
Deputy Clerk

APPENDIX C

INQUISITION AND JUDGMENT

Oct. 24 Inquisition assessing damages as to Tracts Nos. A-100-1, A-100-2, A-100-2, A-100-E-1, A-100-E-3, A-100-E-4 and A-100-E-5 in the total sum of Fourteen Thousand Dollars ($14,000.00) and awarding same to John C. Webb and Helen H. Webb, tenants by entirety, filed.

" " Judgment on Inquisition assessing damages as to Tracts Nos. A-100-1, A-100-2, A-100-E-1, A-100-E-3, A-100-E-4 and A-100-E-5 in the total sum of Fourteen Thousand Dollars ($14,000.00) and awarding same to John C. Webb and Helen H. Webb, tenants by entirety, with interest at the rate of six percent until paid, from the dates of the taking of said Tracts, on the difference between the amount deposited by the Government as the estimated award for the taking of said Tracts, and the amount of the damages awarded by the Inquisition.

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No. 538

In the Supreme Court of the United States

OCTOBER TERM, 1958

JOHN C. WEBB and HELEN H. WEBB, PETITIONERS

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 16-19) is reported at 256 F.2d 669. The opinion of the District Court (Pet. App. 20-28) is reported at 157 F.Supp. 401.

JURISDICTION

The judgment of the Court of Appeals was entered on June 30, 1958 (Pet. App. 16). The petition for a writ of certiorari was filed on November 25, 1958, extensions of time to November 26, 1958, having been granted by Mr. Chief Justice Warren. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in this federal condemnation proceeding, the District Court abused its discretion in overruling petitioners' motion for a new trial based on the grounds (a) that the attorney for the United States improperly associated with the jury on a bus trip to view the property, and (b) that improper references were made during the trial to the price paid for the property by the petitioners in 1949.

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions relied upon by the petitioners are set out in the petition (Pet. 3).

STATEMENT

The Court of Appeals affirmed, per curiam, the order of the District Court overruling a motion for a new trial in this condemnation suit brought by the United States in 1955 to condemn certain land in Montgomery County, Maryland, belonging to petitioners (Pet. App. 16-28). The facts pertinent to the questions presented by this petition may be summarized as follows:

The land which was taken by the United States comprised approximately 23 acres of a tract of 200 acres that had been acquired by the petitioners in 1949. Each side produced expert witnesses who differed widely in their valuations. The witnesses for the United States valued the entire tract at $56,000 to $60,000 and valued the portion taken at $8,500 to $10,000. The witnesses for the petitioners valued the entire tract at approximately $91,000 and valued

the part taken at $41,350 to $43,000. The jury awarded petitioners the sum of $14,000 (Pet. App. 17, 20).

The attorney for the United States, making a general explanation of the subject matter of the trial in his opening statement, pointed out that the entire tract had been purchased by petitioners some years before for $23,000. Counsel for petitioners objected. The court deferred ruling because it could not determine in advance of the testimony whether the date of purchase was too remote from the date of taking by the Government as to make it inadmissible (Pet. App. 27).

After the opening statements by counsel for both parties, the jury was sent in a body with Deputy Marshals to view the property. It was arranged that they were to be accompanied by the lawyers on both sides. The judge announced that the property owners or their lawyers might point out the lines of the property but that nobody was to say anything to them about the value of the land. Accordingly, the jury, with court officials and the attorney for the Government, rode in a bus from the court house in Baltimore to the property, but by reason of some misunderstanding petitioner (Mr. Webb) and his attorney failed to appear at the appointed time and consequently did not ride with the jury in the bus. They proceeded to the property by private automobile and there met the jury. When the tour of inspection had ended, Mr. Webb and his attorney were offered an opportunity to return to Baltimore in the

bus with the jury but they found it more convenient to decline because they could reach their homes more directly by another route (Pet. App. 17-18). No objection was made by petitioners' attorney as to what had transpired (Pet. App. 26).

Later, during the course of the trial, in the examination of one of the Government's expert witnesses reference was made a second time to the price petitioners had paid for the property in 1949, but upon objection by counsel for petitioners the evidence was stricken. At that time and subsequently, in his concluding argument, the attorney for the United States explained that he had referred to the purchase price to enable the appraisers to consider the increases in the value of the land in the area and that the Government did not contend that the property was worth only $23,000, but had in fact offered two expert witnesses who had testified that the property was worth $56,000 to $60,000 at the time of the taking in 1955. No objection to this statement was made by the attorney for the petitioners (Pet. 7; Pet. App. 18-19, 27-28; R. 18-26).

After the jury had returned its verdict the attorney for the petitioners withdrew his appearance as counsel and two other attorneys who had not been counsel in the case before that time appeared for the petitioners and filed a motion for new trial urging as error (a) improper conduct of the jury and counsel for the Government in riding on the bus without counsel for petitioners and (b) reference during the trial to the price petitioners paid for the property.

The district court heard evidence and argument on this motion. It ruled that there had been no improper conduct by the attorney for the United States, that the mere fact of his presence on the bus without counsel for petitioners did not prejudice petitioners, and that reference to the price paid by petitioners for the property was understood in context by the jury and was expressly excluded as evidence of value both by the attorney for the United States and by the court (Pet. App. 20-28). The court of appeals affirmed per curiam. It carefully reviewed the record and found that there was "no evidence of any impropriety" on the part of Government counsel, that, under the circumstances presented, "no harm was done to the property owners by the references to the price which they had paid for the property," and that, accordingly, the district court did not abuse its discretion in overruling the motion for a new trial (Pet. App. 16-19).

ARGUMENT

1. Petitioners do not say that the jurors were in fact prejudiced in favor of the Government, nor do they say that the attorney for the Government did or said anything to influence the jury. After careful consideration of the entire matter, both Judge Chesnut and the Court of Appeals found no evidence of impropriety. Petitioners merely suggest that bias or prejudice "might have" resulted from the fact that Mr. Webb and counsel did not accompany the rest of the party in the bus to view the property and that "team work" was "bound" to develop between

the attorney for the Government and the jury, with petitioners and their attorney becoming the outsiders or stranger. Petitioners' counsel who was involved at the time did not suggest any such possibility. It has only been raised after trial and rendition of the verdict. The arguments advanced as to such subtle influence do not justify setting aside a verdict resulting from what Judge Chesnut characterized as "a full and fair trial on the merits of the case" (Pet. App. B 25). As was stated in *United States* v. *Sorcey*, 151 F.2d 899, 903 (C.A. 7), certiorari denied, 327 U.S. 794: "But, we must not permit the integrity of the jury to be assailed by mere suspicion and surmise; it is presumed that the jury will be true to their oath and conscientiously observe the instructions of the court * * *."

In the federal courts, if there had been improper conduct sufficient to raise a presumption of prejudice, the presumption would be rebuttable and not conclusive as petitioners contend. *Remmer* v. *United States*, 347 U.S. 227, 229; *Mattox* v. *United States*, 146 U.S. 140, 148-150; *Wheaton* v. *United States*, 133 F.2d 522, 527 (C.A. 8). Where the trial court has considered and decided a motion for new trial on the basis of possible prejudice of the jury, its decision is discretionary and reviewable by a federal appellate court for abuse of discretion only. *Wiltsey* v. *United States*, 222 F.2d 600 (C.A. 4); *United States* v. *Sorcey*, 151 F.2d 899 (C.A. 7), certiorari denied, 327 U.S. 794; *Ryan* v. *United States*, 191 F.2d 779 (C.A. D.C.), certiorari denied, 342 U.S.

928; *Turner* v. *United States*, 222 F.2d 926 (C.A. 4), certiorari denied, 350 U.S. 831.

It seems evident, as found by the two courts below, that the suspicion advanced by petitioners is without substance and that a presumption of improper influence can not be supported on such conjecture. In any event, there is nothing presented which calls for a review by this Court of the discretion exercised by the trial court in refusing a new trial. It was according to law and supported by reason.

2. The second ground on which the motion for new trial is based is likewise untenable (Pet. App. 18). Judge Chesnut examined the transcript and found no substantial reasons for granting a new trial in view of the context in which the reference was made to the price petitioners paid for the property (Pet. App. B 26-27). He had expressly excluded it as evidence of value. The Court of Appeals also examined the transcript and reached the same conclusion. In addition, it pointed out that (Pet. App. 19): "At no time did they move the court to declare a mistrial on the ground that the mention of the purchase price was prejudicial, nor did they take any exceptions whatsoever to the judge's charge to the jury, which made a fair resume of the evidence and left to the jury to decide whether the land that was taken should be valued as agricultural land or land subject to subdivision and development for residential purposes." In these circumstances, it cannot reasonably be said that petitioners did not have a fair trial or that the judge abused his discretion in overruling the motion for a new trial.

CONCLUSION

The decision by the Court of Appeals is correct and does not call for review by this Court. The petition for a writ of certiorari should be denied.

Respectfully submitted,

J. LEE RANKIN,
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